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Eric Schaaf, Esq.
Regional Counsel
United States Environmental Protection Agency
Region II
290 Broadway
New York, New York 10007-1866

Re: Passaic River Allocation of Responsibility/*De Minimis* Settlements

Dear Mr. Schaaf:

The ten undersigned entities (the Undersigned Entities) – all of whom are parties to the Administrative Settlement and Order on Consent for Remedial Investigation/Feasibility Study; Lower Passaic River Study Area (LPRSA) portion of the Diamond Alkali Superfund Site and recipients of General Notice Letters from the United States Environmental Protection Agency (EPA) concerning the LPRSA – hereby petition EPA for *de minimis* status under Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, (CERCLA), 42 U.S.C. § 9622(g)(a). For the reasons set forth below, the Undersigned Entities meet EPA's criteria for a *de minimis* settlement, and believe that the time is ripe for EPA to begin discussions to foster such a settlement.

We view this process as complementary to the Lower Passaic River Cooperating Parties Group's (CPG) ongoing discussions with EPA in connection with the CPG's preparation of the RI/FS for the LPRSA. The successful remediation of the LPRSA will require careful consideration of both the appropriate remedy as well as the relative contributions thereto of all PRPs, including *de minimis* parties.

As reflected in the attached submissions that set forth specific information regarding the alleged connection of each of the Undersigned Entities to the LPRSA, there is no credible evidence that any of the Undersigned Entities are responsible for any release of dioxins, furans, or polychlorinated biphenyls (PCBs) in the LPRSA. These are the hazardous substances EPA has determined are overwhelmingly driving the risk to human health and the environment in the LPRSA, and the Undersigned Entities are simply not associated with those contaminants. With regard to the other hazardous substances identified as contaminants of potential concern (COPCs) or ecological concern (COPECs), namely various pesticides and metals, discharges of such hazardous substances by the Undersigned Entities are minimal or non-existent, and have not resulted in impacts to the Lower Passaic River that require remediation.

Therefore, the Undersigned Entities respectfully request that EPA begin a process to define and execute *de minimis* settlements with those parties as prescribed by CERCLA Section 122(g). We commit to cooperate in that effort.

Background

As you know, it is the "extremely high concentrations of dioxin" at and from the former Diamond Alkali manufacturing facility that resulted in the addition of that facility to the National Priorities List in 1984.[1] In fact, the initial investigations at what became the Diamond Alkali Superfund Site were part of "EPA's National Dioxin Strategy."[2] Dioxin-driven investigations also led to the 1994 identification of Operable Unit 2 of the Diamond Alkali Superfund Site, the lower six mile stretch of the Passaic River, the 2002 identification of Operable Unit 3 of the Site, the entire LPRSA, and the 2004 identification of Operable Unit 4, Newark Bay.

Notwithstanding this basis for the NPL listing, at the request of the parties associated with the Diamond Alkali manufacturing facility, EPA has directed notice letters to well over one hundred entities alleged to have been dischargers to the LPRSA.[3] This limited action was taken by EPA despite the fact that the LPRSA has been a highly industrial waterway since at least the 1800s, receiving direct and indirect discharges including hazardous substances from hundreds, if not thousands, of facilities, including numerous sewage treatment facilities.

The Undersigned Entities

The Undersigned Entities are alleged to have owned or operated one or more of those thousands of facilities, and are further alleged to be potentially responsible for releases from their facilities to the LPRSA of one or more of various organic compounds, metals, petroleum products, and phthalates, but none of the hazardous substances that EPA has identified as the primary risk drivers in the LPRSA.

Although hundreds, if not thousands, of facilities have released hazardous substances to the LPRSA, the Undersigned Entities are among only seventy-three PRPs that have, since 2007, spent more than $100,000,000 completing the Remedial Investigation and Feasibility Study (RI/FS) for the LPRSA pursuant to the Administrative Settlement Agreement and Order on Consent, CERCLA Docket Number 02-2007-2009, May 8, 2007 (the RI/FS AOC).

The Undersigned Entities are also among the seventy PRPs that conducted the removal and capping of contaminated sediment in the so-called RM 10.9 Study Area pursuant to the RM 10.9 AOC at a cost in excess of $20,000,000. As you know, the entities responsible for all or nearly all of the releases of 2,3,7,8-TCDD that EPA has determined is the major risk driver in the LPRSA did not participate in that response action and are no longer participating in the RI/FS.

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[1] *See* NPL Site Narrative, September 21, 1984.
[2] *See* Record of Decision for Diamond Alkali Superfund Site, September 1987, page 4.
[3] *See* Focused Feasibility Study Report for the Lower Eight Miles of the Lower Passaic River, prepared by the Louis Berger Group, Inc. in conjunction with Battelle HDR/HydroQual, for EPA Region 2 and the United States Army Corps of Engineers, Kansas City District (2014) (FFS), section 1.2.2, page 1-6 (FFS). *See also* RM 10.9 AOC, paragraph 11.

The PRPs performing response actions pursuant to the RI/FS AOC and the RM 10.9 AOC have been left to their own devices to allocate among themselves financial responsibility for the hundreds of millions of dollars of work that is the subject of those agreements with EPA. Significantly, those allocations did not account for critical distinctions EPA has now recognized between individual hazardous substances and the extent to which they drive perceived risk to human health and the environment. The entities responsible for the contamination at and from the former Diamond Shamrock facility are no longer participating in those allocations. Moreover, those allocations do not include the hundreds, if not thousands, of other PRPs that have not participated in response actions to date. As a result, PRPs' ability to allocate the costs of any future work is severely constrained.

Prior Request for *De Minimis* Consideration

In February 2007, some of the Undersigned Entities joined other PRPs in requesting that EPA enter into *de minimis* settlements respecting the LPRSA with PRPs entitled to such treatment under Section 122(g) of CERCLA and the EPA guidance implementing that statutory directive.[4]

EPA's response to that request was that it was "of the opinion that at the present time, EPA is not able to assess individual PRP's [sic] contributions relative to the total volume of waste at the Site and that EPA does not possess sufficient information to distinguish among various tiers of PRPs without risk that new post-settlement information will render a *de minimis* settlement inequitable and unsupportable in retrospect."[5]

The Current Situation and Findings Support *De Minimis* Settlements

Now that the Remedial Investigation Report, prepared by the Louis Berger Group, Inc. in conjunction with Battelle HDR/HydroQual, for EPA Region 2 and the United States Army Corps of Engineers, Kansas City District (2014) (the RI), and the FFS for the Lower Eight Miles of the Lower Passaic River (the Lower Eight Miles) have been issued, and the RI/FS for the entire LPRSA is nearly complete, EPA's previous position about not possessing sufficient information to enable *de minimis* settlements no longer applies.

Again, EPA's own FFS concludes that it is dioxins, furans, and PCBs that are primarily responsible for the risk to human health and the environment in the Lower Eight Miles.

Since EPA has acknowledged that the Lower Eight Miles contain eighty to ninety-five percent of the total load of hazardous substances in the entire LPRSA,[6] it should come as no surprise that the soon-to-be-completed RI/FS for the entire LPRSA will not identify any additional hazardous substances as risk drivers.

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[4] *See* Correspondence to Alan J. Steinberg, Regional Administrator, EPA Region II, dated February 2, 2007.
[5] *See* Correspondence from George Pavlou, Director, Emergency and Remedial Response Division, EPA Region II, to David J. Hayes, Esquire, Latham & Watkins, LLP, dated March 5, 2007.
[6] *See* FFS, page 1-11.

As a result, whether or not EPA possessed sufficient information to enter into *de minimis* settlements respecting the LPRSA in 2007, the Agency certainly has more than enough information to honor Section 122(g)'s directive and EPA's own guidance implementing that directive by entering into *de minimis* settlements now. Such *de minimis* settlements are particularly useful to the Government in complex cases involving numerous PRPs. In fact, Agency guidance recognizes that the early elimination of minor potentially responsible parties is "one of the primary goals" of Section 122(g).[7]

It is not necessary "to prepare a waste-in list or volumetric ranking before considering a party's eligibility for a *de minimis* settlement."[8] This is particularly significant where, as noted, the alleged contributions from the Undersigned Parties contained none of the primary risk drivers, and none or only *de minimis* levels of any other risk-associated substances.

Taking this statutorily required action consistent with EPA's own guidance will also fulfill EPA's commitment in the RI/FS AOC to "take measures to obtain the participation of Non-Settling Parties or newly identified parties as the RI/FS proceeds."[9]

Otherwise, those PRPs primarily responsible for the releases of hazardous substances driving response actions in the LPRSA will continue to contribute far less than their fair share of the cost of those response actions, and many PRPs will contribute nothing at all, while a small percentage of the PRPs, including the Undersigned Entities, which are either not liable or clearly entitled to *de minimis* treatment under Section 122(g), will continue to be asked to pay far more than their fair share.

In the continued absence of a *de minimis* settlement process, a Gordian knot of contribution litigation is inevitable, involving hundreds, if not thousands, of entities with ties to the Passaic River watershed. As EPA is aware, the LPRSA has already spawned such unwieldy and inefficient contribution litigation. In a lawsuit brought by the State of New Jersey against the owners and operators of the Diamond Alkali manufacturing facility, and successors in interest, two of the defendants filed a third party complaint against more than three hundred third-party defendants, and lists identifying thousands of potential fourth-party defendants were filed with the Court. *See* New Jersey v. Occidental Chemical Corporation, et al., Superior Court of NJ, Docket Number ESX-L9868 (PASR). The burden to *de minimis* PRPs of being forced to endure the costs of defending cost recovery litigation brought by other PRPs is exactly what Section 122(g) and EPA's own guidance are intended to avoid. Aside from needless expense and gross inequity for *de minimis* parties, such litigation and the ensuing gridlock will also be a major obstacle for EPA's remediation efforts.

The Requirements of Section 122(g) and EPA's Implementing Guidance

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[7] *See* Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA (June 19, 1987), page 10.
[8] *See* Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A) (July 30, 1993, OSWER Directive 9834.7-1D) (Streamlined Approach), page 1 (emphasis in original).
[9] *See* RI/FS AOC, paragraph 7.

CERCLA Section 122(g) mandates that "[w]henever practicable and in the public interest," [EPA] "shall as promptly as possible reach a final settlement with a potentially responsible party" (i) "if such settlement involves only a minor portion of the response costs at the facility concerned," (ii) "the amount of the hazardous substances contributed by that party to the facility" "is minimal in comparison to other hazardous substances at the facility," and (iii) "the toxic or other hazardous effects of the substances contributed by that party to the facility" "is minimal in comparison to other hazardous substances at the facility." In fact, CERCLA requires EPA to notify a PRP of its *de minimis* eligibility "[a]s soon as practicable after receipt of sufficient information to make a [*de minimis*] determination."[10]

National guidance instructs how Regions are to implement Section 122(g)'s mandate. "To determine whether a PRP is eligible for a waste contributor de minimis settlement, a Region need only assess the individual PRP's waste contribution relative to the volume of waste at the Site. . . . [T]he amount does not need to be a precise figure."[11] "To reduce resource implications for de minimis parties, Regions should actively assist in forming [a] de minimis group once there is a potential for a de minimis settlement."[12]

The Application of Section 122(g)(1)(A) and EPA's Guidance to the Undersigned Entities

A. The Amount of Hazardous Substances Contributed by the Undersigned Entities is Minimal in Comparison to the Total Amount of Hazardous Substances in the LPRSA

It bears repeating that there is no credible evidence that any of the Undersigned Entities released any dioxins, furans, or PCBs to the Passaic River.

As recognized in the FFS, upstream and downstream sources continue to release to the LPRSA all of the hazardous substances identified by EPA as being of potential concern except 2,3,7,8-TCDD. Similarly, tributaries to the Lower Passaic River as well as Combined Sewer Overflows and Storm Water Outfalls continue to release virtually all of the hazardous substances (except 2,3,7,8-TCDD) identified by EPA as being of concern in the LPRSA, and serve as ongoing sources that will maintain such hazardous substances in LPRSA sediments at regional background levels. In fact, in-depth investigations of the likely fate and transport of the hazardous substances allegedly released to the LPRSA by the Undersigned Entities indicate that such alleged releases are minimal in comparison to these ongoing releases and regional background levels.

Each of the Undersigned Entities is prepared to demonstrate to the EPA that releases from their facilities are not driving the risk to human health and the environment that requires remediation of the LPRSA.

Since none of the Undersigned Entities are responsible for ***any*** contribution of the primary

[10] 42 U.S.C. § 122(g)(10).
[11] Streamlined Approach, page 1.
[12] Streamlined Approach, pages 4-5.

hazardous substances driving risk in the LPRSA, and their contributions of any other hazardous substances pale in comparison to the total mass of those hazardous substances in the LPRSA, the total maximum alleged contribution of those hazardous substances by any of the Undersigned Entities is minimal in comparison to the total amount of those hazardous substances in the LPRSA.

Therefore the first element of Section 122(g)'s *de minimis* directive is satisfied.

B. The Toxic or Other Hazardous Effects of the Hazardous Substances Contributed by the Undersigned Entities is Minimal in Comparison to the Toxic or Other Hazardous Effects of all of the Hazardous Substances in the Lower Passaic River Study Area

As discussed above, the FFS makes clear EPA's conclusion that the perceived human health risk relating to the presence of hazardous substances in the LPRSA is attributable to the presence of dioxins, furans, and PCBs.

The FFS makes equally clear EPA's conclusion that nearly all the perceived ecological risk relating to the presence of hazardous substances in the LPRSA is attributable to these same hazardous substances.

Because the Undersigned Entities are not responsible for any releases of 2,3,7,8-TCDD (or any dioxins or furans), or PCBs, to the LPRSA, the toxic or hazardous effects of the hazardous substances the Undersigned Entities allegedly contributed to the Lower Passaic River are, at most, minimal compared to the toxic or hazardous effects of the dioxins, furans and PCBs that overwhelmingly drive the perceived human health and ecological risk at the LPRSA.

A Proposed Path Forward

EPA now has more than enough information to support *de minimis* settlements respecting the LPRSA consistent with its statutory mandate and its own guidance. EPA has the benefit of volumes of information respecting the nature and mass of the hazardous substances released at the LPRSA, and which of those hazardous substances contribute to the perceived human health and ecological risk related to the site, and to what degree. Based on that evidence, it is highly unlikely that anyone, including EPA, could succeed in establishing that any of the Undersigned Entities are legally responsible for any response actions in the LPRSA. However, with the benefit of that information, and the information available respecting the alleged releases of hazardous substances by PRPs eligible for *de minimis* settlements, including the Undersigned Entities, an allocation of responsibility for the continuing response to those releases is certainly practicable. We respectfully request that EPA now initiate a process to define and execute *de minimis* settlements as prescribed by Section 122(g) and EPA's own guidance.

In closing, we reiterate that we view this process as complementary to the CPG's preparation of the RI/FS for the LPRSA.

Annexed hereto please find contact information for the Undersigned Entities (Appendix A) and brief summaries of their respective operations and alleged nexus to the LPRSA (Appendix B).

The Undersigned Entities are committed to cooperating in the development of a *de minimis* settlement and look forward to meeting with EPA soon to define and implement a process for bringing such a settlement to fruition. We will look forward to hearing from you about when we might meet to that end.

Very truly yours,

Daniel Riesel
On behalf of Coats & Clark, Inc. and the Undersigned Entities

Jeffrey B. Gray
On behalf of CBS Corp.

Stephen Swedlow
On behalf of Croda Inc.

Norman W. Spindel
On behalf of Franklin-Burlington Plastics Inc.

Roger Florio
On behalf of General Electric Company

Earl W. Phillips, Jr.
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Paul Milmed
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John R. Holsinger
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Paul Milmed
On behalf of Wyeth LLC

cc: Walter Mugdan